person she did not know. The district court, however, designated C.P. as the primary parent and custodian of K.P., and all decisions, including decisions regarding medical care, schooling, religious training and any other primary needs of K.P. rest with C.P. Despite this, the district court later warned the Petitioners that if they exercised this responsibility *vis a vis* visitation with J.D., the court would take K.P. away from them.

On January 24, 2004 the Petitioners, appearing *pro se*, filed a Motion For New Trial. The Petitioners argued that the Fourteenth Amendment to the U.S. Constitution created a liberty interest arising from the relationship of love and duty in a recognized family unit, and that the court's ruling had bastardized K.P. The Court on February 23, 2004 denied the Petitioners' Motion For New Trial without addressing their Fourteenth Amendment rights. Neither did the court rebut or otherwise address the Petitioners' argument that the court's ruling had bastardized K.P.

The Petitioners later retained new counsel, who on March 31, 2004 filed their Petition to Terminate Parental Rights, Petition For Adoption, and Complaint For Birth Costs and Delinquent Child Support. On June 4, 2004, citing this Court's strong holding in *Michael H.*, the Petitioners petitioned the state district court for a Stay of Visitation pending the outcome of the termination and adoption proceedings. The Court on July 13, 2004 ordered the newly-filed termination and adoption proceedings consolidated with the already-decided action recognizing J.D.'s parental rights, without holding any hearings regarding the Petitioners' pleading. The Court stated "the two actions involve common questions of law and fact, and consolidation of the two actions will tend to avoid unnecessary costs and delay." The court

again did not address the legal principles cited to it by the Petitioners, and stated by this Court in *Michael H.*

As the lower court's predisposition regarding the matters at issue was clear, and not favorable to them, the Petitioners assessed possible appeal options. They determined that J.D. had not filed a Notice of Entry of Judgment following the lower court's December 24, 2003 Order. Again relying on this Court's strong holding in *Michael H.*, the Petitioners filed on December 13, 2004 a Notice of Entry of Judgment and Notice of Appeal to the Montana Supreme Court, appealing the lower court's Order essentially granting J.D. parental rights.

The Petitioners' appeal was filed on April 1, 2005. They stated the issues as (1) The U.S. Supreme Court Has Ruled That An Adulterous Father, Like JD, Has No Right To Interfere With The Unitary Family, Like The Petitioners. The District Court Erred In Ruling Otherwise.; and (2), The District Court Erred By Allowing A Rebuttal Of KP's Paternity. The Montana Supreme Court restated the issues, thereby avoiding discussion and application of this Court's holding in *Michael H.*

The Montana Supreme Court on November 23, 2005 ruled against the P.s. The Court cited a factually inapt 1983 U.S. Supreme Court decision, *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), which the Montana Court had cited in *Paternity of Adam*, 273 Mont. 351, 903 P.2d 207 (1995). The Montana Supreme Court has not addressed *Michael H.*, though *Michael H.* post-dates *Lehr*, and contrary to *Lehr*, the fact pattern is directly analogous to the Petitioners' circumstances.

The Petitioners on December 8, 2005 filed a Petition For Rehearing under M.R.App.P. 34, again citing *Michael H.* extensively. The Petitioners cited numerous errors of both fact and law committed by the Montana Supreme Court. The Petitioners argued that the Court erred by determining that J.D.'s reputed savings account constituted payment of child support to K.P., when it was completely unavailable for K.P.; had failed to recite critical facts regarding J.D.'s treatment of his son; that the Court re-stated, and thereby misstated, the legal issues present; that the Court cited outdated legal authority; and that, unlike *Michael H.*, the Petitioners are not international models or executives for multi-nationals, jetting around the globe—they are simply trying their best to raise their four children. The Court on December 20, 2005, without any substantive response, or addressing *Michael H.*, denied the Petitioners' Petition For Rehearing.

REASONS FOR GRANTING THE PETITION

I.

THE FEDERAL QUESTION.

This Court has held, by granting *certiorari* in the California case *Michael H.*, that an attack on the unitary family by an adulterous natural father is a federal court matter that abridges, among others, fundamental rights to parenting in the presence of a unitary family. This Court in *Michael H.* protected the unitary family of Gerald and Carole D. The Petitioners are entitled to equal protection under this Court's jurisprudence.

Michael alleged that California's somewhat rebuttable statutory presumption regarding legitimacy infringed his due process rights, as well as the child's right to have a relationship with her natural father. This Court, however, recast the issue as,

> Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that is has. In fact, quite to the contrary, our traditions have protected the marital family . . . against the sort of claim Michael asserts.[3]

The trend toward rebuttable presumptions of legitimacy, particularly as applied to these facts, serves no legitimate purpose here, but rewards rapists, sperm donors and those who fornicate with married women, and brands the children in K.P.'s position bastards for life. Montana's rebuttable presumption regarding legitimacy should be found unconstitutional as applied, for this and the reasons set forth below.

Moreover, as recently as the latest confirmation hearings, this Court has, individually and collectively, accorded great deference to *stare decisis*. In *Michael H.*, this Court held that it is impossible to find that relationships between adulterous natural fathers and their offspring can be treated as protected family units, and upheld the primacy of the

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3. *Michael H.*, 491 U.S. 110, 124.

unitary family. On that basis, the Court protected the family of Gerald D. and Carole D., including their other offspring from their marriage. The Petitioners seek no more and no less.

Furthermore, by granting *certiorari* in the California case arising out of state court, this Court essentially preempted state law on the specific issue of adulterous parent rights. This Court in *Michael H.* said as much:

> Even if the law in all States had always been that the entire world could challenge the marital presumption and obtain a declaration as to who was the natural father, that would not advance the claims of the adulterous natural father.[4] Thus, it is ultimately irrelevant, even for purposes of determining current social attitudes towards the substantive right Michael asserts, that the present law in a number of States appears to allow the natural father—including the natural father who has not established a relationship with the child—the theoretical power to rebut the marital presumption.[5]

This Court has in *Michael H* thus put an end to equality or primacy of adulterous father's rights.

This Court limited its pronouncement to the relevant facts of *Michael H.*, which are much less sympathetic than the facts here, as it is possible that a different conclusion

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4. *Id.* at 126, 127.

5. *Id.*

might arise with regard to adulterous fathering of a child whom the marital parents do not wish to raise as their own. The facts here, that K.P. has been wholly embraced by her parents, her brothers, her aunts, uncles and grandparents, her church and her community, are unchallenged and unassailable.

The Montana Supreme Court has ruled against the Petitioners' unitary family, contrary to both this Court's prior holding, and directly contrary to other states, *e.g.* the Florida Supreme Court, which held: "We are reluctant to legally recognize lawsuits instituted by those simply professing to be biological fathers which (sic) impugn the legitimacy of children and disrupt families' lives."[6] There is thus no consistency on this issue in either federal or state courts nationwide.

The Montana Supreme Court ruling abridged the Petitioners' fundamental constitutional rights of parenting and association. Not only is K.P. forced into an artificial, disruptive relationship, so, too, are her parents—could they divorce J.D.?

From the state district court to the supreme court, the Montana courts committed material errors of fact and law regarding long-standing, recognized federal constitutional fundamental rights, and at every turn ignored this Court's holding in *Michael H.* This Court should both overrule the Montana Supreme Court holding, and pointedly enforce this Court's judgment.

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6. *G.F.C. v. S.G. and D.G.*, 686 So.2d 1382, Fla. L. Weekly D283 (1997).

II.

AS FORESEEN BY THIS COURT IN *MICHAEL H.*, THE UNITARY FAMILY IS HARMED BY RECOGNIZING MULTIPLE FATHERS.

While our society has largely reconciled most stigmas associated with children of divorced parents, there is, and can be, no reconciliation under these facts. As the Court stated in *Michael H.*, "the facts of this case are, we must hope, extraordinary." They may well be extraordinary, but they are not non-existent. The P.s are precisely the family this Court worried about in *Michael H.*

In one of the many subsequent law reviews discussing *Michael H.*, author Lynn Marie Kohm astutely observed:

> The state might conclude from the social experience with children of divorce that, while it can be hard to be raised by two people on difficult terms who do not live together, it would be even worse to be brought up by three people, two of whom (the two men) have reason to be on hostile terms, two of whom (the mother and the lover) have reason to be on tense terms, and two of whom (the mother and the husband) have reason to be struggling to maintain a happy relationship.[7]

Kohm summarized succinctly this Court's concerns as expressed in *Michael H*, and precisely typified the Petitioners'

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7. Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of Michael H. v. Gerald D.*, 22 Whittier L.Rev. 327, 369 (2000).

circumstances. K.P. has been forced into a relationship with a stranger, J.D., when she already has a true father, G.P., who was the first person she saw as she entered this world. The P.s struggle daily with the circumstances identified by Kohm and this Court in *Michael H.*, balanced by their love for K.P. and their sons, and anchored by their faith. Statistics show that nearly half of all families suffer divorce under the best of circumstances. If their family were to disintegrate under these greater pressures, K.P. would be torn between three households, scattered to the winds.

III.

IF *MICHAEL H.* IS NOT ENFORCED BY THIS COURT, SURROGATE PARENTS, ADULTERERS, RAPISTS, SPERM DONORS AND OTHER THIRD PARTIES WILL ERODE OUR NATION'S FOUNDATION, UNITARY FAMILIES.

The *Michael H.* Court parried Justice Brennan's dissent regarding the adulterous natural father's claim of a protected liberty interest. In refuting his position, this Court stated, "The logic of Justice Brennan's position leads to the conclusion that if Michael had begotten Victoria by rape, that fact would in no way affect his possession of a liberty interest in his relationship with her."[8]

This Court was concerned in *Troxel* that even grandparents' claims could undermine the fundamental right to parent.[9] The Court was interpreting an expansive

8. *Michael H. and Victoria D. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989).

9. *Troxel v. Granville*, 520 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

Washington statute allowing "any person" to petition for visitation rights.[10] There, the surviving mother had entered into an agreement for visitation with her deceased husband's parents, but they wanted more. The Court held the statute violated the parent's due process right to make decisions concerning the care, custody, and control of her children.

The liberty interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty rights recognized by this Court.[11] The liberty protected by the Due Process Clause includes the right of parents to establish a home and bring up their children; and to direct the upbringing and education of children under their control.[12]

Here, the Montana statute at issue, Mont. Code Ann. § 40-6-105, is even more expansive and invasive on the family than Washington's visitation statute. Montana's Uniform Parentage Act should thus be subject to strict scrutiny. Visitation to an interested party is one thing—bestowing actual parental rights to "any interested party" is quite another. In pertinent part, Mont. Code Ann. § 40-6-107 states, Determination of father and child relationship—who may bring action. (1) **Any interested party** may bring an action for the purpose of determining the existence or nonexistence of the father and child relationship presumed pursuant to 40-6-105. [Emphasis added].

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10. Washington Rev.Code § 26.10.160(3).

11. *Troxel v. Glanville*, 530 U.S. 57, 65.

12. *Id.*

In *Troxel*, this Court was not reviewing a test of the Washington visitation statute at its margins, *e.g.*, alleged rights of an interested child molester, but rather the children's loving grandparents, with whom there was little conflict. The analysis of the statute is thus applicable here. In the instant case, there is immense conflict regarding not only the current forced relationship, but J.D.'s recently-filed efforts to expand his visitation rights, to include full weekends and lengthy vacations, all of which conflict with K.P.'s time with her family of brothers and parents, further confuse her, and bastardize her before an ever greater universe of persons.

Kohm opines that the seven years-plus litigation involved in *Michael H.*, during which the child could not know the status of her parents, is a kind and length of instability widely deplored.[13] K.P. is even younger, and completely unable to synthesize the role of J.D. in this artificial human relationship.

To thus allow under these facts "any interested party" to seek a court's endorsement as a father, with all attendant rights, further violates the Petitioners' rights alleged here. Like *Michael H.*, J.D. knew that C.P. was married, and that people commonly lack legal or even social rights in their married lover's children.[14] This Court has observed that such actions have even been deemed criminal. Michael, just like J.D. here, probably knew that asserting a claim to the child could harm the marriage he had already damaged.[15] In fact,

13. Kohm, *supra*, p. 370.

14. *Id.*

15. *Id.*

the Petitioners believe this is a central motive of J.D. here, who felt jilted when the Petitioners reconciled.

In *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U.L.Rev. 353 (1991), Professor John Lawrence Hill postulates the principle of "intended parents":

> I use the term "intended parents" here to describe the person or couple who initially intended to raise the child. Three conditions must be met for persons to be considered intended parents: (1) the intended parents must plan to have a child before the conception of the child; (2) they must take morally permissible measures, not limited to biological procreation, to bring a child into the world; and (3) they must meet certain minimally adequate conditions to be able to raise and care for the child.

Hill further observes at 66 N.Y.U. L. Rev. 353, 366, the Supreme Court has stated that parental rights are "'[r]ights far more precious . . . than property rights.'"[16] More specifically, "'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'"[17] The zone of family privacy and parental authority has been afforded both substantive and procedural protection under the Due Process

16. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)).

17. *Smith v. Org. of Foster Families*, 431 U.S. 816, 842 (1977) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

Clause.[18] This cluster of constitutional protections includes the right of the family to live together,[19] the right of parents to raise their children as they deem fit,[20] and the right of parents to educate their children without state interference.[21] The procedural protections recognized pursuant to the due process clause require that parental rights may not be terminated without notice and a hearing,[22] and without at least clear and convincing evidence of parental unfitness.[23]

Here, under Hill's analysis, only the P.s can be the "intended parents." First, C.P. did not plan to have a child with J.D. while she was already married to G.P.; additionally, it is immoral for J.D. to plan a child with a married woman, and illegal for him to marry C.P.; second, as stated, J.D. procreating a child with C.P., who is married to G.P., is not morally permissible; and third, only the Petitioners collectively meet minimally adequate conditions to be able to raise and care for K.P.

Based on this Court's historical jurisprudence supportive of the unitary family, the Petitioners' personal choices in family matters, and privacy and parental authority has been

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18. *Id.*

19. *Moore v. City of E. Cleveland*, 431 U.S. 494, 505-06 (1977).

20. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

21. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

22. *Stanley v. Illinois*, 405 U.S. 645, 655-57 (1972).

23. *Santosky v. Kramer*, 455 U.S. 745, 758-68 (1982).

abridged by the Montana courts, thus violating the Due Process Clause of the Fourteenth Amendment; they cannot live together and raise their child the way they want. Moreover, though they have been found by the lower court to be good and fit parents, indeed their rights have been partially terminated by the Montana courts for the period their daughter is lost to them, without the requisite showing by clear and convincing evidence.

Ultimately, how will the nation's courts distinguish between the validity of claims for parental rights by "any interested party," including rapists, sperm donors, surrogate mothers and adulterers? By applying the holding in *Michael H.* to the Petitioners' case here, and affording them equal protection of this Court's jurisprudence, this Court will negate such claims, and protect our basic family unit, and indeed, our society.

CONCLUSION

The Petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF MONTANA DECIDED NOVEMBER 23, 2005

No. 05-183

IN THE SUPREME COURT OF THE STATE OF MONTANA

2004 MT 297

IN RE PARENTING of K.P.

J.D.,

Petitioner and Respondent,

v.

C.P. and G.P.,

Respondents and Appellants.

Submitted on Briefs: September 14, 2005

Decided: November 23, 2005

Justice Patricia O. Cotter delivered the Opinion of the Court.

¶ 1 C.P. and G.P., mother and putative father of K.P. (Appellants), appeal the District Court's legal declaration of her biological father's paternity and Order directing the parties to devise a parenting plan for visitation and support. C.P. and G.P. also request a stay of judgment from the District

Court Order, while Respondent, J.D., the biological father, requests costs and attorney fees associated with this Appeal. We affirm the District Court, and deny both the Appellants' request for a stay, and Respondent's request for costs and attorney fees.

ISSUES

¶ 2 The restated issues on appeal are:

1. Did the District Court err when it allowed a rebuttal of G.P.'s presumed paternity?

2. Did the District Court abuse its discretion when it applied Montana's "best interest of the child" standard to recognize J.D.'s paternity?

3. Should this Court issue a stay of the District Court Order?

4. Is J.D. entitled to costs and attorney fees resulting from this appeal?

FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 K.P., the now three-year old child at the heart of this paternity dispute, was conceived during an extra-marital affair between her mother, C.P., and J.D. The affair occurred while C.P. was temporarily estranged from her husband, G.P. Shortly after finding out she was pregnant, C.P. reconciled with G.P., who with full knowledge of the affair and C.P.'s pregnancy, forgave his wife and then supported

her through her pregnancy. G.P. participated in K.P.'s birth, signed K.P.'s birth certificate as her father, and thereafter held K.P. out as his child. During the eighth month of C.P.'s pregnancy, C.P. and G.P. asked J.D. to relinquish any paternity claim and allow them to raise the baby in their family. J.D. declined, and then fearing C.P. and G.P. would prevent contact between him and the child, on July 12, 2002, J.D. petitioned the District Court for a determination of paternity.

¶ 4 On August 1, 2002, the District Court held a hearing on J.D.'s Petition for Determination of Paternity. At that time, C.P.'s and G.P.'s attorney acknowledged that under Montana law J.D. had a right to request genetic testing to determine whether he was the biological father of C.P.'s yet unborn child. Neither C.P. nor G.P. objected to testing. Moreover, both knew it was unlikely G.P. was the biological father of the child because he had a vasectomy several years prior. As C.P., G.P., and J.D. all agreed to submit to DNA testing, the District Court ordered them each to provide samples for testing within 30 days of the child's birth.

¶ 5 DNA testing conclusively showed that J.D. was the biological father of K.P.

¶ 6 In October 2002, the District Court referred this case to Family Court Services (Family Court). In December 2002, J.D. began weekly visitation with K.P. who was then four months old. Initially J.D. was allowed one 30-minute visit per week supervised by the staff at the Nurturing Center in Kalispell, which supervision J.D. arranged. Gradually the duration of K.P.'s visits increased, and moved to J.D.'s home as approved by Family Court. During the visits observed by

Family Court's Director, J.D. was "continually . . . on time[,] . . . interested in visits, [and] acted appropriately at visits." Then, in May 2003, following an incident between J.D. and C.P., G.P. disallowed subsequent visitation.

¶ 7 On May 29, 2003, Family Court filed its Parenting Plan Evaluation and Report with the District Court recommending K.P. be given "every opportunity to know, love, and be cared for by her biological father." Family Court's recommendation was based on: interviews, responses to questionnaires, joint meetings, and home visits with the parties; interviews with professionals involved with the case; interviews with the parties' personal references; observation of K.P.'s interactions with the parties; and reviews of criminal and other court information. Given K.P.'s young age, and the loving home provided by C.P. and G.P., Family Court further recommended that K.P. stay in her mother's primary care, so long as she and G.P. did not deny J.D. visitation, with gradual implementation of parenting time for J.D. Family Court emphasized that K.P. was at a "significant stage of her development," and that "to date, the experiences [C.P.] and [G.P.] have provided in regard to [K.P.]'s association with her natural father are distorted and sad." Family Court recommended that should C.P. and G.P. continue to prevent meaningful interaction between J.D. and K.P., K.P. be placed in J.D.'s primary care.

¶ 8 J.D. then filed a motion for implementation of an interim parenting plan, for which the District Court held a hearing on June 23, 2003. The court then appointed a guardian ad litem (GAL) to prepare a report regarding K.P.'s best interests.

Appendix A

¶ 9 At the June 2003 hearing, Appellants' pastor and counselor both testified they believed K.P.'s best interests would be served by C.P.'s and G.P.'s plan for K.P.'s upbringing. They expressed their hope that K.P. would grow up without contact with, nor knowledge of J.D., until she reached an age of maturity when C.P. and G.P. could tell her about the circumstances of her conception, and allow her to decide whether to establish a relationship with J.D. In the interim, C.P. would periodically inform J.D. of K.P.'s well-being through photos, medical records, and letters from C.P.

¶ 10 The Director of Family Court also testified. On cross-examination, she stated that it is in K.P.'s "best interests to have a relationship with her father, [J.D.]." The Director based her opinion on the investigation she conducted in preparing her written Report, as well as her professional experience and "knowledge of children and their relationships with their parents ... where children seem to have some need—I would even go so far as to call it an innate need—to know their biological parents. . . . I believe that [K.P.] should be given the opportunity now, rather than to wait until she is 14 and [sic]—or 15 years old and put a decision like that on her. . . ." K.P.'s GAL, after extensive investigation including her own interviews with the parties and others, and observations of K.P. with the parties, agreed with the Director's assessment.

¶ 11 The District Court, after hearing the evidence, and considering the recommendations of Family Court and K.P.'s GAL, issued Findings of Fact, Conclusions of Law, and Judgment on December 9, 2003, concluding that "the best interests of [K.P.] would be served by recognizing the

paternity of [J.D.] and by gradually establishing a parent/child relationship. . . ." Specifically the District Court found: J.D. maintains suitable housing, and acquired appropriate furnishings to care for his young daughter; both K.P.'s mother and J.D. provide a "stable and healthy home environment" for K.P.; since before K.P.'s birth, J.D. demonstrated a "full commitment to the responsibilities of parenting [her];" and J.D. has maintained continuous employment, purchased medical insurance for K.P., and paid child support into a banking account in K.P.'s name. The District Court ordered that a parent-child relationship be established between K.P. and J.D., and that the parties exchange final parenting plans and develop a support plan for K.P.

¶ 12 Following the District Court's entry of judgment, C.P. and G.P. filed numerous motions, including an untimely motion for new trial, a petition to terminate J.D.'s parental rights, a petition for adoption, and two consecutive motions to stay the District Court's Judgment. J.D. then filed a motion for contempt because C.P. and G.P. repeatedly resisted J.D.'s attempts to exercise visitation. Notably, however, despite the flurry of motions filed by both parties, J.D. failed to file a notice of entry of judgment after the District Court ruled in his favor in December 2003. A year later, on December 13, 2004, C.P. and G.P. filed a Notice of Entry of the December 2003 Judgment, and immediately thereafter filed a Notice of Appeal.

¶ 13 We require prevailing parties to serve a notice of entry of judgment "before the thirty day deadline for filing notice of appeal begins to run." *Quantum Electric, Inc., v. Schaeffer*, 2003 MT 29, ¶ 29, 314 Mont. 193, ¶ 29, 64 P.3d 1026, ¶ 29

(citations omitted). Moreover, such notice may be filed by either party. Rule 77(d), M.R.Civ.P., *In re Estate of Spencer*, 2002 MT 304, ¶ 18, 313 Mont. 40, ¶ 18, 59 P.3d 1160, ¶ 18. Because C.P. and G.P. filed a Notice of Entry of Judgment followed by a timely Notice of Appeal, this matter is properly before us. We now turn to the merits of the appeal.

DISCUSSION

¶ 14 Did the District Court err when it allowed G.P.'s presumed paternity to be rebutted with genetic testing?

¶ 15 Appellants failed to preserve this issue for appeal when they did not object to the DNA testing at the hearing on J.D.'s Petition for Determination of Paternity. To properly preserve an issue for appeal, a party must notify the court at the time the objectionable conduct is at issue. *Jenks v. Bertelsen*, 2004 MT 50, ¶ 12, 320 Mont. 139, ¶ 12, 86 P.3d 24, ¶ 12. Untimely objections are not heard on appeal, as the time for correcting the error has passed. *State v. Vandersloot*, 2003 MT 179, ¶ 23, 316 Mont. 405, ¶ 23, 73 P.3d 174, ¶ 23. Failure to make a timely objection constitutes a waiver. *Hunt v. K-Mart Corp.*, 1999 MT 125, ¶ 10, 294 Mont. 444, ¶ 10, 981 P.2d 275, ¶ 10.

¶ 16 Here, C.P. and G.P. voluntarily waived the presumption of G.P.'s paternity when they failed to object to the District Court's order that the testing take place. Not only did they not object to the DNA testing, but they both agreed to participate, even while they must have known G.P. was not likely the father because he had a vasectomy years prior. Only after the District Court made its final determination in this case did Appellants object for the first time to the rebuttal of

G.P.'s presumed paternity. We conclude that their failure to object at the hearing when the District Court ordered DNA testing constituted a waiver of Appellants' rights to appeal this issue.

ISSUE TWO

¶ 17 Did the District Court abuse its discretion when it determined it was in K.P.'s best interest to recognize J.D.'s paternity?

¶ 18 We review a district court's application of the "best interest of the child" standard and declaration of paternity for an abuse of discretion. *Matter of Paternity of Adam (1995)*, 273 Mont. 351, 358, 903 P.2d 207, 211. A trial court abuses its discretion when it "act[s] arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice." *In re Paternity of C.T.E.-H.*, 2004 MT 307, ¶ 16, 323 Mont. 498, ¶ 16, 101 P.3d 254, ¶ 16 (citations omitted).

¶ 19 In *Paternity of Adam*, this Court explicitly adopted the "best interest of the child" standard for resolving paternity disputes under Montana's Uniform Parentage Act (UPA). 273 Mont. at 357, 903 P.2d at 211. Later, in *Girard v. Williams*, we reviewed the statutory framework set out in Montana's UPA by which the legal parent-child relationship may be established, and recognized that "once a paternity action is initiated under the UPA, a court may determine whether a judicial declaration of a father-child relationship would be in the best interests of a child," which declaration may also provide for visitation, support, and other provisions. 1998

MT 231, ¶ 21, 291 Mont. 49, ¶ 21, 966 P.2d 1155, ¶ 21, outlining §§ 40-6-109, 40-6-111 to 114 and 116, MCA, reiterated in *In re the Parenting of D.A.H.*, 2005 MT 68, ¶ 8, 326 Mont. 296. ¶ 8, 109 P.3d 247, ¶ 8.

¶ 20 This Court has consistently honored the rights involved in relationships between natural parents and their children. We have also recognized that mere biology does not automatically warrant the legal rights and responsibilities accompanying a determination of paternity. *Compare Girard*, 1998 MT 231, 291 Mont. 49, 966 P.2d 1155, (where we discussed the "best interest of the child" test's applicability to paternity disputes, and denied to non-parent caretakers the standing to challenge the natural father's request for custody of his two children who lived with the caretakers for an extended period while he was incarcerated), with *Paternity of Adam*, 273 Mont. 351, 903 P.2d 207, (where we affirmed that a judicial declaration of the natural father's paternity was not in the best interest of the child because the natural father did little to establish a parent-child relationship or provide care and support for his son despite financial ability and father's knowledge of paternity). In addition, we have relied on the U.S. Supreme Court's guidance as well. *See Paternity of Adam*, 273 Mont. at 354, 903 P.2d at 209, Girard, at ¶ 67 (in dissent), and *In re C.R.O.*, 2002 MT 50, ¶ 66, 309 Mont. 48, ¶ 66, 43 P.3d 913, ¶ 66 (in dissent), citing *Lehr v. Robertson (1983)*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614.

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship

> with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Paternity of Adam, 273 Mont. at 355, 903 P.2d at 209, quoting *Lehr*, 463 U.S. at 262, 103 S.Ct. at 2993-94, 77 L.Ed.2d at 627.

¶ 21 In Montana, biology is a "weighty factor" in applying the best interest standard, but not the "controlling consideration." *Paternity of Adam*, 273 Mont. at 357, 903 P.2d at 211. Once a biological connection is established, a court must weigh that factor against other evidence of the parent's commitment to caring for the child, and fulfilling the role of a "parent" acting in the best interests of his child.

¶ 22 We require courts to evaluate specific criteria when determining the best interests of children in paternity disputes. In these cases, a court must consider: "the existence of a home environment; the stability of the present home and family; the extent to which uncertainty of parentage already exists in the child's mind; the efforts and commitments . . . the putative father has taken to establish supportive and financial ties with the child; as well as any other factors which may be relevant in assessing the potential benefits or detriments to the child." *Paternity of Adam*, 273 Mont. at 357-58, 903 P.2d at 211. A court's conclusion that a paternity declaration is in the best interest of a child must be

based on facts in the record. *Paternity of Adam*, 273 Mont. at 357, 903 P.2d at 210-11 (citation omitted).

¶ 23 Here, the District Court evaluated the criteria sanctioned by this Court for determining a child's best interest, and relying on evidence in the record, determined that recognizing J.D.'s paternity was in K.P.'s best interest. We find no abuse of discretion in this decision. The record reflects that J.D. maintains suitable housing and appropriate furnishings to care for K.P.; J.D. provides a "stable and healthy home environment" for K.P.; since before K.P.'s birth, J.D. has demonstrated a " full commitment to the responsibilities of parenting [her];" and J.D. remains employed, provides K.P. with medical insurance, and pays child support into a banking account in K.P.'s name.

¶ 24 Additionally, the District Court's determination of paternity comports with testimony provided at trial by the Family Court Director and K.P.'s GAL, both of whom opined a parent-child relationship between J.D. and K.P. would best serve her long-term well-being. The Director testified that it is in K.P.'s "best interests to have a relationship with her father, [J.D.]," and that children have an "innate need" to know their natural parents. K.P.'s GAL concluded that legally recognizing J.D.'s paternity, to immediately foster a meaningful relationship between K.P. and him, would serve K.P.'s best interests.

¶ 25 Further, the record reflects that throughout this dispute, J.D. has made consistent efforts to spend time with K.P. and develop a relationship with her. Despite C.P.'s and G.P.'s repeated efforts to stall and prevent visitation, J.D.

consistently made his availability for visits known through counsel, arranged for the supervision of his visits with K.P. with the Nurturing Center when the District Court required it, and according to Family Services has "continually been on time for visits, been interested in visits, [and] acted appropriately at visits."

¶ 26 This case stands in stark contrast to *Paternity of Adam*, where the district court applied the same criteria for determining the child's best interest but issued the opposite ruling. In *Paternity of Adam*, the blood bond between Adam and the petitioner was undisputed, as here. However, in that case, the natural father "demonstrated no personal commitment to or responsibility for Adam," the father had neither suitable housing nor employment, and he failed to provide support of any kind. Adam's mother and her husband, on the other hand, shared a "strong emotional relationship" with Adam, a stable marital relationship with each other, and provided Adam with financial stability in a safe and suitable home where Adam was "loved and well cared for." *Paternity of Adam*, 273 Mont. at 358, 903 P.2d at 211. We affirmed that a declaration of paternity in Adam's natural father, who had failed to perform as a parent, was not in Adam's best interest. Here, while C.P. and G.P. unquestionably provide K.P. with an excellent home, we must analyze what J.D. brings to K.P.'s life. J.D. has demonstrated the qualities of parenthood which warrant a judicial declaration of J.D.'s paternity, and which justify giving K.P. the opportunity to know and love her natural father.

¶ 27 Appellants maintain the U.S. Supreme Court's ruling in *Michael H. v. Gerald D.*, should control this Court. (1989),

491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91. We disagree. The seminal question addressed in *Michael H.* was whether the due process provisions of the U.S. Constitution grant a party other than a husband or wife the right to challenge the paternity of a child born to the wife. Appellants here correctly contend that, in keeping with the U.S. Supreme Court's ruling, neither the Constitution, nor the long-held social policy of protecting the legitimacy of children born to unitary families, offers natural fathers a vehicle for asserting paternity *where state law denies that opportunity.* However, the *Michael H.* Court expressly acknowledged that "it is a question of legislative policy and not constitutional law whether [a state] will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." 491 U.S. at 129-30, 109 S.Ct. at 2345, 105 L.Ed.2d at 110.

¶ 28 Montana's lawmakers have exercised their prerogative to allow the rebuttal of a husband's presumed paternity by third-parties to the marriage. In Montana, a husband is presumed to be the natural father of children born to his wife during their marriage. Section 40-6-105(1)(a), MCA. However, the husband's presumed paternity may be rebutted by a preponderance of evidence, or by blood test results which disprove his paternity. Section 40-6-105(3). Consequently, the U.S. Supreme Court's ruling upholding a California law, which prevented Michael H. and his natural daughter from challenging the presumed paternity of her mother's husband, has no bearing on this case.

¶ 29 C.P. and G.P. also contend that, despite the copious evidence relied on by the District Court, recognizing J.D.'s

paternity still is not in K.P.'s best interest because J.D. did not pay medical expenses occasioned by K.P.'s delivery. Section 40-4-212(j), MCA, specifies that if a parent knowingly fails to pay birth-related costs the parent is able to pay, it is not in the child's best interest. However, payment of "birth related costs are non-exclusive factors to be considered with all factors when determining the best interests of the child." *Paternity of C.T.E.- H.*, ¶¶ 40-41. In weighing the evidence before it, the District Court determined that, on balance, sufficient evidence was presented to extend to J.D. the opportunity, uniquely afforded him by biology, to parent his child. We find no abuse of discretion by the District Court in making its determination.

ISSUE THREE

¶ 30 Should this Court issue a stay of the District Court Order?

¶ 31 Because we conclude the District Court did not abuse its discretion when it declared J.D.'s paternity, and ordered the parties to devise a parenting plan that would allow for both visitation with, and support for, K.P., Appellants' request for a stay of the District Court Order is denied as moot.

ISSUE FOUR

¶ 32 Is J.D. entitled to reasonable costs and attorney fees resulting from this appeal?

¶ 33 J.D. claims this appeal was intended to cause delay, and is an abuse of the judicial system. He therefore seeks

sanctions under Rule 32, M.R.App.P. We disagree that Appellants' argument is so frivolous as to indicate bad faith. Costs and attorney fees are therefore denied.

CONCLUSION

¶ 34 For the foregoing reasons, we affirm the District Court ruling, deny the Appellants' motion for a stay of the District Court Order, and deny Respondent's request for costs and attorney fees on appeal.

s/ Patricia Cotter
Justice

We Concur:

s/ Karla M. Shay
Chief Justice

s/ W. William Leaphart
s/ [illegible]
s/ [illegible]
Justices

APPENDIX B — ORDER AND RATIONALE OF THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD DATED FEBRUARY 23, 2004

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

Cause No. DF-02-003

IN RE THE PARENTING OF:

KIRSTEN SCARLET PRESTEGAARD,

JON DESART,

Petitioner,

vs.

CARRIE PRESTEGAARD and GLEN PRESTEGAARD,

Respondents.

ORDER AND RATIONALE

This matter is before the Court on Respondents' Motion For A New Trial and Respondents' Request For Stay Of Judgment. The Court having considered the memoranda in support and opposition and being fully advised in the premises, now enters the following:

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ORDER

IT IS HEREBY ORDERED that Respondents' Motion For A New Trial is DENIED.

IT IS FURTHER ORDERED that Respondents' Request For Stay Of Judgment is DENIED.

RATIONALE

Respondents' have requested a new trial pursuant to Rule 59, M.R.Civ.P. They have based their request on Section 25-11-102(1) and (4), MCA, which state as follows:

> (1) irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;
>
> (4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial;

Respondents allege that the following four irregularities prevented them from having a fair trial:

First, that Court ordered DNA testing was prior to Glen Prestegaard being made a party and contrary to Section 40-6-105(2)(a), MCA. Petitioner and Respondent, Carrie Prestegaard, appeared with counsel on August 1, 2002, and stipulated to the entry of an order requiring DNA testing.

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The order requiring testing was signed by the Court on August 20, 2002. Section 40-6-112, MCA, not Section 40-6-105(2)(a), MCA, controls blood or DNA testing and requires a "reasonable request" by any party. Although, at the time of the Court's order, Respondent, Glen Prestegaard, had not been named as a party, had he objected to DNA testing and claimed paternity, he would have immediately been joined as a necessary party. Clearly, considering the facts of this case, Petitioner's request for blood testing was reasonable and would have been ordered over any objection by Respondents. DNA testing did not prevent a fair trial.

Second, that this case was prematurely referred to Family Court Services against Respondents wishes. A review of the file is contrary to this allegation. Respondents on October 7, 2002, requested that this matter be referred to Family Court Services and with no opposition from Petitioner, their motion was granted on October 28, 2002. Apparently Respondents have now changed their minds. The report from Family Court Services was filed in May 2003, well in advance of final disposition of this matter and Respondents had adequate notice and time to provide other evidence and testimony. Respondents disagree with the Family Court Services recommendations but this disagreement did not prevent them from having a fair trial.

Third, that there are alleged errors in the report filed by the Guardian Ad Litem on September 8, 2003. This report was filed and available for review by the parties one week before the final hearing on September 15, 2003. At that hearing, both parties were present with counsel, the Guardian Ad Litem was sworn and testified with each party given the

opportunity to examine the witness, and both were given the opportunity to provide additional testimony and evidence if so desired. The actual errors alleged in the report were not material and certainly did not prevent a fair trial.

Fourth, that information was withheld from the Court against Respondents' wishes. This complaint appears to be a disagreement between Respondents and their own counsel as to the evidence presented at trial. There is no allegation that the Court, any adverse party or any order of the Court in any fashion limited Respondents' case which prevented a fair trial.

The remaining two allegations claimed by Respondents in their motion for a new trial are concerning newly discovered evidence. Both their "Equitable Estoppel" argument and the 1996 family studies and statistics are new arguments not newly discovered evidence which with reasonable diligence could have been produced at trial. Accordingly Respondents' Motion For A New Trial must be denied and the Court's Judgment, dated December 9, 2003, is in full force and effect and enforceable by either party.

DATED this 23rd day of February, 2004.

s/ Stewart E. Stadler
District Judge

APPENDIX C — FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD DATED DECEMBER 9, 2003

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

Cause No. DF-02-003

IN RE THE PARENTING OF:

KIRSTEN SCARLET PRESTEGAARD,

JON DESART,

Petitioner,

vs.

CARRIE PRESTEGAARD and GLEN PRESTEGAARD,

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter is before the Court Petitioner's Petition for Determination of Paternity, Adoption of Parenting Plan and

Appendix C

Child Support. The Court has considered the testimony and other evidence presented at both the hearing which was held on June 23, 2003, on Petitioner's Motion For Interim Parenting Plan and the final parenting hearing, with a report from the Guardian Ad Litem, held on September 15, 2003. The Court having considered the testimony and other evidence presented, the memoranda in support and opposition and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. Respondents, Carrie and Glen Prestegaard, were married in 1987 and have three sons, ages 6-15 years.

2. In 2001, after a move to Eureka, MT, Respondents began to experience marital problems. In March, 2001, Carrie Prestegaard initiated contact with Petitioner, Jon Desart, a former boyfriend living in Chicago, Illinois. Carrie and Jon began communicating regularly by phone and e-mail.

3. In May, 2001, Carrie and Glen were separated and Carrie filed for the dissolution of their marriage. Also in May, 2001, Carrie traveled to Chicago to visit with Jon.

4. Carrie and Jon's relationship continued and Jon traveled from Chicago to Kalispell in August, 2001, for a 10 day visit. Jon permanently relocated to Kalispell in September, 2001. When Jon relocated, his 8 year old son, Alex, from a former marriage who resides with his mother, remained in the Chicago area. Although from a distance, Jon maintains regular contact with his son and still takes an active role in parenting.

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5. From her six month relationship with Jon, Carrie learned in November, 2001, that she was pregnant.

6. In December 2001, Carrie and Glen reconciled and the pending dissolution action was dismissed. Carrie and Glen request that Jon relinquish any paternity claim and allow them to raise the child in their family. Jon disagreed and filed a petition for determination of paternity in July, 2002.

7. Carrie gives birth to Kirsten Prestegaard on August 15, 2002. Glen participated in the birth and his name is placed on the birth certificate as the child's father. Although Glen, as Carrie's husband, is presumed to be the father, the parties do not dispute that Jon is the biological father and the presumption is rebutted.

8. In October, 2002, on Carrie Prestegaard's motion, the dispute between the parties as to parental contact and a parenting plan that would be in the child's best interests, is referred to Family Court Services.

9. In December, 2002, Jon was allowed weekly visitation with Kirsten. Initially, these visits were once a week for 30 minutes and were supervised by the Nurturing Center. In March, 2003, the visits were increased to 45 minutes and after a home visit by Family Court Services in April, 2003, Jon was allowed a two hour visit. During the May 3, 2003 visit, Jon allegedly winked at Carrie and for that reason Glen terminated any further contact with the child.

10. Family Court Services' Report to the Court was filed on May 29, 2003, and recommends that Kirsten be given

"every opportunity to know, love, and be cared for by her biological father", with the gradual implementation of parenting time for Jon.

11. A hearing was held on Jon's motion for implementation of an interim parenting plan on June 23, 2003. At this hearing the Court determined that this matter should properly be considered under the Uniform Parentage Act, Section 40-6-101, MCA, *et seq.* Pursuant to statute, the Court ordered that Glen Prestegaard be named as an additional party and that a guardian ad litem (GAL) be appointed for the child. The matter was continued until September 15, 2003, for additional testimony and a report from the GAL.

12. The GAL's thorough and complete report was filed with the Court on September 10, 2003. The GAL, after interviewing the parties and all others associated with this matter made the following findings with regard to the best interests of Kirsten, which are adopted by the Court:

> (a) Considering the adversarial nature of the relationship between the parties, that shared parenting would not be an option.
>
> (b) Kirsten should be allowed to immediately resume visitation with Jon Desart. However, because of the child's age and the limited contact with Jon and taking into account her need for stability and continuity, any visitation be accomplished with an appropriate transition period.

(c) Both parties have a stable and healthy home environment and should be viewed as good and proper parents. Kirsten, because of her age and the circumstances of this case, should remain primarily at the Prestegaard residence other than at times of age appropriate visitation with Jon.

(d) That the paternity of Jon Desart be recognized.

(e) That any parenting plan strongly consider the stability and continuity of Kirsten's home environment, her strong bond with her mother as primary care giver and her needs as a one year old child.

13. At all times, Jon Desart has demonstrated a full commitment to the responsibilities of parenting this child. Jon would have continued to develop a parent-child relationship with Kirsten, if not for the refusal to allow visitation by the Prestegaards.

14. Both Jon Desart and Glen Prestegaard have the ability to provide valuable contributions to the growth and development of Kirsten and each should be allowed to do so.

15. Jon Desart has taken the necessary steps to obtain suitable housing, to include appropriate furnishings, he has maintained continuous employment, he has purchased medical insurance for Kirsten, which Prestegaards have declined to use, and he has paid monthly child support into an account for Kirsten.

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16. If this Court were to adopt the recommendations of the Respondents, it would for all purposes result in the termination of Jon Desart's parental rights.

15. The following parenting plan is in the best interests of Kirsten Prestegaard:

(a) Carrie Prestegaard is designated as the primary parent and custodian of the child. Until further order of this Court, all decisions, including decisions regarding medical care, schooling, religious training and any other primary needs of Kirsten rest with Carrie Prestegaard.

(b) Jon Desart is to have the following gradual implementation of parenting time:

(1) For the three months following the date of this order, Jon shall be allowed visitation with Kirsten one time per week for three hours each time. The first four visits are to be supervised and if requested, in the presence of the Prestegaards.

(2) For the remainder of the period up until Kirsten's 2nd birthday, Jon shall be allowed visitation with Kirsten two times per week for three hours each time.

(3) For the period between Kirsten's 2nd and 3rd birthdays, Jon shall be allowed visitation with Kirsten two times per week

for three hours each time and one weekend day per month for up to eight hours each time. The child is to be returned to the other parent a least one-half hour before bedtime.

(4) After Kirsten's 3rd birthday and unless a continuing parenting plan is agreed to by the parties, any future modifications would require Court review to consider the current circumstances of the parties and their child.

(c) No financial evidence was presented and the Court is without sufficient information to determine child support or medical support. The parties are to exchange proposed final parenting plans and financial affidavits for the purpose of calculation support pursuant to the Montana Child Support Guidelines. If the parties are unable to agree on a final parenting plan to implement the Court's Findings and the parties respective support obligations, a further hearing will be set by the Court at the request of either party.

From the foregoing Findings of Fact, the Court now makes the following:

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CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter.

2. Prior to a determination of a father/child relationship in a paternity suit brought under Montana's Uniform Parenting Act, the Court' must consider the best interests of the child.

3. Given the facts and circumstances of this case, the best interests of Kirsten Prestegaard would be served by recognizing the paternity of Jon Desart and by gradually establishing a parent/child relationship with his daughter with a patenting plan and parenting time as previously set forth in the Findings of Fact.

4. Child Support and medical support should be calculated pursuant to the Montana Child Support Guidelines.

From the foregoing Findings of Fact and Conclusions of Law, the Court now enters the following:

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JUDGMENT

IT IS HEREBY ORDERED:

1. That the Court recognizes the paternity of Jon Desart and directs that a parent/child relationship be established with a parenting plan and visitation as specified in the Findings of Fact, above.

2. That the parties are to exchange proposed final parenting plans and financial information for a determination of support issues and attempt to resolve both issues prior to requesting an additional hearing.

DATED this 9th day of December, 2003.

s/ Stewart E. Stadler
Stewart E. Stadler
District Judge

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF MONTANA DENYING PETITION FOR REHEARING DATED DECEMBER 20, 2005

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 05-183

In re the parenting of K.P.:

J.D.,

Petitioner and Respondent,

v.

C.P. and G.P.,

Respondents and Appellants.

C.P. and G.P., by counsel, have filed a Petition for Rehearing. J.D., by counsel, has filed a Response. J.D. urges us to deny the Petition for Rehearing, and seeks an award of fees and costs incurred in responding to what J.D. considers a baseless petition. Upon due consideration,

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

IT IS FURTHER ORDERED that J.D.'s request for the imposition of fees and costs is likewise DENIED.

Appendix D

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this Order to all counsel of record.

DATED this 20th day of December, 2005.

s/ Karla M. Gray
Chief Justice

s/ Patricia Cotter
s/ W. William Leaphart
s/ [illegible]
s/ [illegible]
Justices

(2)

No. 05-1234

FILED
MAY 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

C.P. and G.P.,

Petitioners,

v.

J.D.

Respondent.

On Petition for Writ of Certiorari To the Supreme Court of the State of Montana

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Lori B. Miller, P.C.
309 Wisconsin Avenue
Whitefish, MT 59937
Counsel for Respondent

QUESTION PRESENTED

Whether the Montana Eleventh Judicial District Court and the Montana Supreme Court correctly applied Montana law, and concluded that it was in the best interests of K.P. to recognize the paternity of J.D., and to gradually establish a parent child relationship between K.P. and J.D.

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Statute

Section 40-6-105 M.C.A. 7

STATEMENT OF JURISDICTION

The Montana Eleventh Judicial District Court and the Montana Supreme Court rendered decisions based solely on Montana paternity and custody law. At no point in the lower court proceedings did Petitioners challenge the validity of Montana law, and at no time during the lower court proceedings did Petitioners claim a violation of any right, privilege, or immunity under federal law. Petitioners raise such issues for the first time on appeal to the United States Supreme Court. As the Montana Supreme Court based its decision on independent and adequate state grounds, no federal question exists, and the United States Supreme Court lacks jurisdiction to grant certiorari in this matter.

STATEMENT OF THE CASE

This action was commenced when J.D. filed a Petition in the Flathead County District Court

seeking a determination of the paternity of K.P., and an order establishing a parent child relationship with K.P. J.D. and C.P. had a six month relationship during a period of time when C.P. was separated from, and obtaining a divorce from her husband, G.P. App. C, 21a. K.P. was born on August 15, 2002, and at no time did the parties dispute that J.D. is the biological father of KP. *Id.* at 22a. The Court appointed Family Court Services to make a recommendation and report to the Court on whether it was in the best interests of K.P. to declare paternity, and to establish a parent child relationship between J.D. and K.P. Family Court Services recommended that a parenting plan be implemented that allows K.P. every opportunity to know, love, and be cared for by her biological father. *Id.* at 22a, 23a. K.P.'s Guardian ad Litem found that the best interests of K.P. require that the paternity of J.D. be recognized. *Id.* at 23a, 24a. On December 9, 2003, the Montana Eleventh Judicial

District Court found that pursuant to Montana's Uniform Parenting Act, "the best interests of K.P. would be served by recognizing the paternity of J.D. and by gradually establishing a parent/child relationship..." *Id.* at 27a.

On January 24, 2004, C.P. and G.P. filed a Motion for a New Trial and a Request for Stay of Judgment, alleging that paternity testing should not have been ordered, that the case should not have been referred to Family Court Services, that the Guardian ad Litem made errors in her report, and that counsel for G.P. and C.P. failed to present certain evidence to the Court. App. B, 17a, 18a, 19a. The Motion for New Trial and Request for Stay of Judgment were denied because C.P. consented to paternity testing, C.P. requested the referral to Family Court Services, C.P. and G.P. had ample opportunity to review and contest the Report of the Guardian ad Litem, but failed to do so, and any failure to present evidence to the Court was

solely a failure on the part of C.P., G.P., and their attorney. *Id.*

On December 13, 2004, C.P. and G.P. appealed the case to the Montana Supreme Court. The appeal primarily concerned whether the District Court erred when it allowed a rebuttal of G.P.'s paternity, and whether the District Court abused its discretion when it determined it was in K.P.'s best interest to recognize J.D.'s paternity. App. A. The Supreme Court found that C.P. and G.P. voluntarily waived the presumption of G.P.'s paternity when they failed to object to J.D.'s request for DNA testing. *Id.* at 7a. Accordingly, the Supreme Court found that the issue of rebuttal of paternity was not preserved for appeal. *Id.* at 8a. The Supreme Court also concluded that the District Court appropriately applied the best interest standard as set forth in *Matter of Paternity of Adam*, (1995), 273, Mont. 351, 358, 903 P.2d. 207, 211. *Id.* at 8a, 9a.

REASON FOR DENYING THE PETITION

The Petition for Certiorari from the decision of the Montana Supreme Court satisfies none of the criteria for review in this Court. The Montana Supreme Court affirmed factual findings and applied a properly stated Montana law. No federal question was raised or adjudicated, and review should be denied. No decision has been entered by a United States Court of Appeals, and Petitioners do not argue that the Montana Supreme Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. As sole basis for certiorari, Petitioners claim that the Supreme Court of Montana decided an important question of federal law in a way that conflicts with a relevant decision of the United States Supreme Court.

Specifically, C.P. and G.P. argue that the Montana Supreme Court considered matters of

federal law in affirming J.D.'s right to request genetic testing, and his right to assert his paternity of K.P. In reality, the Supreme Court refused to even consider the issue of genetic testing because G.P. and C.P. consented to the testing at the District Court level. App. A., 7a, 8a. The Montana Supreme Court determined that it was in the best interests of K.P. to determine paternity in J.D. according to Montana's Uniform Parentage Act, and pursuant to the holding of the Montana Supreme Court in *Paternity of Adam*. *Id.* at 8a-12a. No federal question was raised, and no federal matter was considered.

The decision of the Montana Supreme Court does not conflict with a relevant decision of the United States Supreme Court.

The narrow ruling of the United States Supreme Court in *Michael H. et al., v. Gerald D.* 491 U.S. 110 (1989) is not at all relevant to the case at hand. The Court in *Michael H.* expressly acknowledged that "it is a question of legislative

policy and not constitutional law whether [a state] will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." *Id.* at 129-130.

The United States Supreme Court in *Michael H.* considered the application of a California law that allows only a husband or wife to rebut a presumption of paternity. Montana legislative policy does not prohibit J.D. from requesting genetic testing simply because he was not married to C.P. at the time that K.P. was born, and at no time did C.P. or G.P. object to the request for genetic testing.

In fact, the Montana Uniform Parentage Act, Section 40-6-105 M.C.A. specifically provides a means for J.D., an individual outside of the marital relationship, to request genetic testing, and to rebut the presumption that G.P. is K.P.'s father.

The Montana Supreme Court considered existing Montana statutes and case law to reach the

conclusion that it was in the best interests of K.P. to recognize the paternity of J.D. and to graduallyestablish a parent child relationship between K.P. and J.D. No federal question was raised, and the holding of the Montana Supreme Court is entirely consistent with all prior holdings of the United States Supreme Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

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